OFFICE OF THE CONFLICT OF INTEREST COMMISSIONER
PROVINCE OF NEW BRUNSWICK

REPORT TO THE SPEAKER OF THE LEGISLATIVE ASSEMBLY OF NEW BRUNSWICK OF THE INVESTIGATION

BY THE HON. PATRICK A.A. RYAN Q.C.
CONFLICT OF INTEREST COMMISSIONER

INTO ALLEGATIONS BY MR. DONALD ARSENEAULT, MLA FOR DALHOUSIE-RESTIGOUCHE EAST, OF VIOLATIONS OF THE *MEMBERS' CONFLICT OF INTEREST ACT* BY DEPUTY PREMIER DALE GRAHAM, MLA FOR CARLETON, AND MINISTER OF THE OFFICE OF HUMAN RESOURCES

Filed with the Speaker:
October 17, 2006

Report of Commissioner:
August 17, 2006

Sent to Debates Translation:
August 17, 2006

Received from Debates Translation:
September 21, 2006

Sent for Printing:
October 2, 2006

Conflict of Interest Commissioner
Officer of the Legislative Assembly

The Hon. Patrick A.A. Ryan, Q.C.

Commissaire aux conflits d'intérêts
Fonctionnaire de l'Assemblée législative

L'hon. Patrick A.A. Ryan, c.r.

October 17, 2006

The Hon. Michael Malley
Speaker of the Legislative Assembly
Legislative Building
PO Box 6000
Fredericton, NB E3B 5H1

Dear Mr. Speaker

Re: Arseneault against Graham

Enclosed is the report of my investigation into allegations of breaches of the *Members' Conflict of Interest Act* against Dale Graham, Member of the Legislative Assembly for Carleton, as requested by the Honourable Donald Arseneault, Member of the Legislative Assembly for Dalhousie-Restigouche East and Minister of Natural Resources.

Pursuant to s. 40 of the *Act*, the report is in quadruplicate to you, the Speaker, and to the Member Dale Graham, the Honourable Bernard Lord, and to the Member of the Legislative Assembly requesting the investigation, the Honourable Donald Arseneault.

In view of the fact that the Assembly is not sitting, it is your responsibility under s. 42(b) to immediately file this report with the Clerk of the Legislative Assembly who shall make copies of the report available to all Members as soon as practicable.

Sincerely,

Ryan

The Hon. Patrick A.A. Ryan, Q.C.

C.c. Loredana Catalli Sonier, Clerk

Report to the Speaker
of the
Legislative Assembly of New Brunswick
of the
Investigation

by the Hon. Patrick A.A. Ryan, Q.C.
Conflict of Interest Commissioner

Into Allegations by Mr. Donald Arseneault, MLA
for Dalhousie-Restigouche East,
of Violations of the *Members' Conflict of Interest Act*
by Deputy Premier Dale Graham, MLA for Carleton,
and Minister of the Office of Human Resources

INTRODUCTION

[1] By documents dated May 5, 2006, delivered to the Office of the Conflict of Interest Commissioner May 8 and supported by supplementary affidavit of May 10, Donald Arseneault, Member of the New Brunswick Legislative Assembly for the riding of Dalhousie-Restigouche East, alleged under oath that Deputy Premier Dale Graham, Member of the Legislative Assembly for the riding of Carleton, and Minister of the Office of Human Resources, had committed breaches of the *Members' Conflict of Interest Act*. Invoking s. 36 of the *Act*, Mr. Arsenault requested that I investigate the breaches as alleged.

[2] Mr. Arseneault alleges that the Deputy Premier furthered his own private interests and that of his company's, Grama's Bake Shop Ltd., and infers that, although his company is in a blind trust, his and his staff's meal attendances at the company premises, possession and/or the use of the company's credit card and the 2005 corporate return for the company showing Dale Graham as a director, are proof that he is still involved with managing the company.

[3] On June 9, 2006 Deputy Premier Graham filed his response to the allegations.

[4] In July, the complainant was invited to reply to the Honourable Mr. Graham's written submission and to give me any further direction on his complaint. There being no further documentation or direction from Mr. Arseneault, the investigation continued with interviews by me of witnesses mentioned in the response of the Deputy Premier, namely his Executive Secretary, Executive Assistant and the company Trustee.

THE LEGISLATION

[5] S. 4 of the *Members' Conflict of Interest Act* sets out the prohibition against furthering the member's private interest or that of another:

> **4** A member shall not make a decision or participate in making a decision in the execution of his or her office if the member knows or reasonably should know that in the making of the decision there is the opportunity to further the member's private interest or to further another person's private interest.

[6] S. 14 of the *Act* is designed to ban a member of the Executive Council, which would include the Deputy Premier position, from engaging in the management of a company and from being a company director unless it is his or her duty as a member of the Executive Council to be a director. Exceptions are provided for in s. 14(2) as approved by the Commissioner.

> **Prohibited activities**
>
> **14**(1) A member of the Executive Council shall not
>
> *(a)* engage in any trade, occupation or employment or in the practice of any profession,
> *(b)* engage in the management of a business carried on by a corporation,
> *(c)* carry on business through a partnership or sole proprietorship,
> *(d)* hold or trade in securities, stocks, futures or commodities, or
> *(e)* hold an office or directorship, unless holding the office or directorship is one of the member's duties as a member of the Executive Council.
>
> **Approval by Commissioner**
>
> **14**(2) A member of the Executive Council may engage in an activity prohibited by subsection (1) if
>
> *(a)* the member has disclosed all material facts to the Commissioner,
> *(b)* the Commissioner is satisfied that the activity, if carried on in the specified manner, will not create a conflict between the member's private interest and public duty,
> *(c)* the Commissioner has given the member his or her written approval and has specified the manner in which the

activity may be carried out, and

(d) the member carries out the activity in the specified manner.

Time for compliance

14(4) A person who becomes a member of the Executive Council shall comply with subsection (1), or obtain the Commissioner's approval under subsection (2), within sixty days after the appointment.

ALLEGED BREACHES

[7] Mr. Arseneault refers to the alleged breaches as improprieties on the part of the Deputy Premier, that is, improper conduct on the part of the member for Carleton. The allegations are separated into five headings and I will deal with each one in turn: (1) that the Honourable Dale Graham spent over $2,300 for staff meals at Grama's for which he was reimbursed by government while attending Grama's approximately 50 times between January 1, 2003 and November 9, 2005 thus furthering his private interests and those of his company, Grama's, contrary to s. 4 of the *Act* ; (2) the Honourable Mr. Graham used a credit card associated with Grama's to book a government sponsored trip to Las Vegas and was reimbursed by the government while the company accumulated "air miles" associated with the credit card, contrary to s. 4; (3) the Honourable Mr. Graham is a director of Grama's as shown on the 2005 annual return filed by the company, a position prohibited under s. 14; (4) as a member of the Executive Council he has engaged in the business of a corporation, namely, Grama's, contrary to s. 14; (5) taken altogether, the facts underlying the allegations prove a conflict of interest.

THE ORDER SOUGHT

[8] Aside from sanctions for breaches of the *Act*, Mr. Arseneault seeks an order that (a) the Deputy Premier "resign as a director" of Grama's, (b) "cancel his company credit card", (c) Grama's renounce any claim to the "air miles", and (d) the Deputy Premier be ordered to "refrain from attending Grama's on such a frequent basis".

THE HONOURABLE MR. GRAHAM'S RESPONSE

[9] Concisely put, the Honourable Mr. Graham's position, in his words, is this:

1. the matters complained of do not, in the circumstances, constitute violations of the Act and do not constitute sufficient grounds for an investigation by you;

2. alternatively, that if a breach of the Act did in your opinion occur, it was trivial and committed through inadvertence or an error in

judgment made in good faith and hence not deserving of any sanction pursuant to section 41(3) of the Act.

SECTION 41(3)

[10] Where allegations are made of breaches to the legislation and I determine that an investigation should be conducted, the *Act* sets out sanctions that the Commissioner may recommend. The one referred to by the Honourable Mr. Graham is as follows:

> **41**(3) If the Commissioner determines that a breach occurred although the member took all reasonable measures to prevent it, or that a breach occurred that was trivial or committed through inadvertence or an error of judgment made in good faith, the Commissioner shall so state in the report and shall recommend that no sanction be imposed.

MEALS AT GRAMA'S IN A ONE RESTAURANT VILLAGE

[11] The company, Grama's Bake Shop Ltd. has been held in a blind trust styled "Blind Management Agreement" since October 12, 2000. The trust arrangement was approved by my predecessor in office as Commissioner.

[12] The company operates a restaurant and bakery at Centreville. It is the only restaurant in the village and has been owned by the Honourable Mr. and Mrs. Graham for many years. The business was incorporated in 1981 and operated by him and his wife. The Honourable Mr. Graham's home and constituency office are in Centreville. His Executive Assistant arranges the Minister's staff meetings in Centreville. The attendees sometimes have business meals at Grama's, the only restaurant within ten kilometers of the village.

[13] The Honourable Mr. Graham does not dispute the allegation that Grama's restaurant is the recipient of business paid for by government but he insists that this is of no moment because the company is under a blind management agreement approved by the previous Commissioner pursuant to s.14(2) of the *Act*.

[14] He responds to the complaint in these words:

> …the restaurant operated by Grama's is the only restaurant in Centreville, which happens to be my home town and location of my constituency office. As a general rule my executive assistant and I spend Mondays in Centreville at my constituency office to deal with my responsibilities as the local MLA and as cabinet minister from that region. In connection with those latter responsibilities, my executive assistant sometimes arranges luncheon meetings at Grama's

> restaurant. All of the meals purchased at Grama's which are referred to in Mr. Arseneault's complaint were purchased by my executive assistant in these circumstances and were purchased over a period of approximately 30 months. It is likely that other provincial employees also purchase meals at Grama's restaurant when they are doing government business in the Centreville area. While I expressly reject and resent the insinuation that I am in some improper manner directing business to Grama's, I again fail to see what relevance such purchases have to the Act. As noted above, the [previous] Commissioner approved my continued involvement in Grama's, subject to the implementation of the Blind Management Agreement. It was and is my understanding that as long as a business is in such a blind trust arrangement it can continue to do business with the government. Such meal purchases violate neither the letter nor the spirit of the Agreement or the Act. While I do not recall the subject of myself or my staff or others purchasing meals at Grama's when in Centreville coming up in my various meetings with the Commissioner over the years, I would have been astonished if he had prohibited it as a condition of his approval. I certainly operated on that assumption and was never given any indication to the contrary. If, however you conclude as a result of this complaint that such purchases should not continue in the future, I will of course follow your advice and direction and instruct my staff to dine elsewhere when they are in the area. If that is your conclusion, I would respectfully submit again that the particular incidents complained of should be treated as trivial in nature and not deserving of any sanction pursuant to section 41(3) of the Act.

[15] The Deputy Premier's Executive Assistant, Debbi Graham, said that she made the arrangements for the meetings, usually on Mondays, for the purpose of continuing constituency business. These took place about 50 times over a period of 149 weeks. She said that it never occurred to her that there was any breach of the *Act* being committed. The people at the meeting had to eat and there was no other restaurant within ten kilometers. She said that no special consideration, deals or discounts were given by Grama's Bake Shop Ltd. I interviewed Debbi Graham at Centreville on July 28, 2006.

[16] I also interviewed Wanda Forsythe, the Trustee for Grama's on July 28. She confirmed what the Executive Assistant said about the meetings at Grama's.

GRAMA'S CREDIT CARD

[17] A credit card issued to Grama's was used for the purchase of tickets for the Honourable Mr. Graham to attend a government business trip to Las Vegas in March of 2003. Mr. Arseneault alleges that the Honourable Mr. Graham should not have a Grama's company credit card. He infers that by possessing the credit card it indicates involvement by the Honourable Mr. Graham in management. Secondly, Mr. Arseneault says that by using the company credit card, the company was awarded points called "air miles" which have the potential of being converted into a benefit for the possessor of the credit card. Without explanation, it is possible, therefore, that the Honourable Mr. Graham may have used the credit card to further his own private interest or that of Grama's private interest by being awarded "air miles" by the credit card company for future use by his company.

[18] The Honourable Mr. Graham responded to the allegations as follows:

(a) HOLDING A CORPORATE CREDIT CARD IN GRAMA'S NAME

> I held a corporate credit card in Grama's name for many years before becoming a member of the Executive Council. The credit card company automatically issued renewal cards every few years and I thought nothing of it. I am not aware of anything in the Act which prohibits this, or deriving other benefits from Grama's, as long as my continued role with Grama's was approved by the [previous] Commissioner under section 14(2), which was the case. I am not aware of anything in the Blind Management Agreement which could be construed as prohibiting it either. I did make a complete and accurate disclosure of my credit card situation in the initial Form 1 disclosure I made to the [previous] Commissioner on June 28, 2000 and updated that each year in my subsequent disclosures. I cannot recall any discussion with the [previous] Commissioner about this particular credit card, but I certainly had, and still have, no reason to believe that it in any way constituted a problem under the Act as long as balances owing were fully paid within 30 days, which was always the practice. Again I rely upon the [previous] Commissioner's approval of my continued involvement with Grama's subject to the Blind Management Agreement as a complete answer to any allegations that holding this credit card constituted any violation of the Act. Again, if you choose to make the disposal of this credit card a condition for any future approval, I will certainly comply with your advice or direction.

(b) USE OF CREDIT CARD TO BOOK LAS VEGAS TRIP

> I have explained the circumstances surrounding this incident in my previous letter to you dated May 4, 2006. The use of that credit card number to book that trip was, as I explained, completely inadvertent on the part of my secretary and the situation was corrected as soon as I became aware of it. To the best of my knowledge, this was the only time this credit card was used in connection with any government business. I expressly deny any insinuation from Mr. Arseneault's complaint that I was deliberately using a personal or corporate credit card for government business in order to build up personal air miles. While I am obviously embarrassed by this incident, and accept full responsibility for it, I am not aware of it constituting any violation of the Act for the same reasons as are noted above. To the extent that any air miles were credited to me as a result of this mistake I will undertake to assign them to the Province, if possible, or to cancel them, or as you may otherwise direct. If you conclude that this incident did constitute a breach under the Act, I would respectfully suggest that it was both trivial and inadvertent (in the words of section 41(3)) and should not result in any sanction.

[19] In my interview with Valerie Upton, the Deputy Premier's secretary, on July 27, 2006 she said that she did not have the actual card but just a list of credit card numbers which did not identify the name. She stated that she had this list in her desk drawer and there was no particular reason why she chose that number when arranging the trip to Las Vegas; that it was used only for the initial booking and was not used for other parts of the trip. She stated, categorically, that she had not been directed by the Honourable Mr. Graham to use this card and that it was her choice and it turned out to be a mistake.

[20] In my interview with the Trustee of Grama's, Wanda Forsythe, she said that the Honourable Mr. Graham does possess a credit card from Grama's but it is used rarely and only for nominal sums. The company is always reimbursed by him.

[21] The Trustee says that the company does accumulate air miles through American Express. The Trustee is prepared to relinquish the (Las Vegas) air miles if I should so order.

[22] Before we lose sight of the air miles argument, it is important to note that it is the Province of New Brunswick that determines the use of air miles. The current directive is that "…frequent flyer points or other travel incentive awards earned while on government business are to be used when obtaining air tickets for future government travel."

THE HONOURABLE MR. GRAHAM AS A DIRECTOR

[23] Mr. Arseneault asserts that the Honourable Mr. Graham, despite the fact that his business was placed under a blind management agreement, is involved in the management of the company as evidenced by the fact, *inter alia*, that he is shown as a director of the company on the 2005 annual return filed under the New Brunswick *Business Corporations Act.* The complainant supports this allegation with references to the obligations of directors under various other pieces of legislation. Thus, goes the argument, if a director is obliged by law to do certain things under various Acts, those certain things involve the director in management duties. Ergo, because he is listed in the annual return for 2005 filed by the General Manager, Wanda Forsythe, he must also, necessarily, be engaged in the management of Grama's.

[24] The Honourable Mr. Graham explains the history of how this came about:

> Grama's was incorporated in 1981 long before my involvement in government. The controlling shareholders were myself and my wife Shelley, and we were both directors of the company. Shelley's father, Burney MacDougall also owned one (1) share to qualify as the third director which I understood was the minimum number required at that time. Grama's carried on business as a restaurant and small bakery in Centreville, New Brunswick. The business was operated by my wife and me and constituted as our sole livelihood until I was elected as an MLA in 1993. We continued to operate the business after my first election in 1993 and subsequent elections in 1995 and 1999. Grama's operates the only restaurant in the Village of Centreville. The next closest restaurant would be in Florenceville, about 10 kilometers away.
>
> On or about May 1, 2000 I received a letter from your predecessor as Conflict of Interest Commissioner advising me of the proclamation of the Act and of my obligation to make disclosure under the Act. I completed both a Member's Private Disclosure Statement (Form 1), and a Private Corporation Statement (Form 3) on behalf of Grama's, on the forms supplied by the Commissioner on June 28, 2000. Copies of both those forms are attached to this letter. As you can see I clearly disclosed in Part D-2 of the Form 3 that both my wife and I were directors and officers of Grama's. Following the submission of these forms I met with the Commissioner on July 19, 2000. He advised me that in order to comply with the Act it was necessary for me to either dispose of my interest in Grama's or to place it in a blind trust. This is confirmed by his letter to me dated July 20,

2000, a copy of which is attached. He specifically recommended placing Grama's under a Blind Management Agreement, and provided me with a suggested form of agreement to give to my lawyer by his further letter of July 24, 2000, which is also attached. My lawyer then dealt directly with the Commissioner in getting a form of Blind Management Agreement finalized which was signed on October 12, 2000 and delivered to the Commissioner shortly after that. The Commissioner confirmed his satisfaction with the agreement upon his receipt of it. It was my understanding that with this Agreement in place, and provided I comply with it, I was in compliance with the act. In particular, I was not directed by the Commissioner nor advised by my lawyer to resign as director of Grama's and no such requirement was included in the agreement. If the Commissioner had advised me to resign, I would certainly have done so, but he did not.

In all the subsequent years I submitted the Short Form Private Disclosure Statement on the form requested by the Commissioner. Each year with respect to Question A-4 A. on that form I truthfully answered that there had not been any changes to my initial disclosure with respect to myself or a member of my family serving as an officer or director of any corporation. As noted above, in my initial disclosure to the Commissioner in June of 2000 I had disclosed the role of myself and my wife as officers and directors of Grama's and my answer on the subsequent disclosure forms confirmed that we were both still directors of Grama's. As you know, each disclosure filing was followed by a personal meeting with the Commissioner. In none of these meetings did the Commissioner raise any concerns about my continuing to be a director of Grama's.

[25] The Trustee, Wanda Forsythe, who filed the 2005 annual return said she simply followed the company precedents for filing annual returns that showed the Honourable Mr. Graham as a director. She completed the annual returns herself without direction. I interviewed the Trustee at Centreville on July 28, 2006 and conducted two telephone interviews with her on July 31 and August 1.

THE ROLLED-UP ASSERTION: THE WEAKEST LINK

[26] The inference that Mr. Arseneault wishes me to draw is that, irrespective of the individual allegations of breach, when you roll them up together, they collectively show a breach of the *Act*. I am not prepared to accept that argument in this investigation. The inherent weakness in the rolled-up argument, linking the

allegations together, will be apparent in the ensuing analyses. The allegations must stand individually on their respective proof and merit.

CONCLUSION EMANATING FROM THE EVIDENCE

MEALS AT GRAMA'S

[27] The Honourable Mr. Graham advises that having staff meals at Grama's was never discussed with the previous Commissioner who gave his approval to the creation of a blind management agreement. I am not surprised at this but I would be surprised that, if the subject had arisen, the Commissioner would not have cautioned Mr. Graham about "the perception of conflict". Perception, in itself, is not a breach of the *Act*.

[28] The meetings at Grama's took place over a period of just under three years. It was a regular pattern. The allegation is that the Minister is steering business to his company which, in the scheme of things may profit him, that is, further his private interest and that of his company even though the profit may be infinitesimally small.

[29] I cannot conclude that the Minister deliberately set out to create a conflict or amass any profit, this being his constituency office meetings, that his Executive Assistant arranged the meetings and that Grama's is the only restaurant in the village and, indeed, within 10 kilometers. I venture to say that any villager would ask: Well, where else would you expect them to eat?

[30] The financial gain may, indeed, be almost negligible but it does exist, no matter how minute. As David Philip Jones, Q.C., the Conflict of Interest Commissioner for the Yukon Legislative Assembly said in his June 27, 2006 Annual Report: "…Members, Ministers, Deputy heads, cabinet and caucus employees must always put the public good above their own private interests, and be seen to do so."

[31] I accept the explanation of the Deputy Premier, his Executive Assistant and his Trustee. Any breach of s.4 is so minimal that it does not call for a sanction. Mr. Arseneault has requested that I order the Honourable Mr. Graham "… to refrain from attending Grama's on such a frequent basis". I will not make an order to that effect but will stipulate that advice to that effect is not bad advice. It is the perception that will continue, unabated, if the advice is not heeded with respect to the frequency of attendances at the company's place of business. However, to say that the Honourable Mr. Graham intentionally acted in such a way as to make a personal and company profit by breaching his responsibility under the trust agreement and by using his public office for a purpose other than the public good would border on the nonsensical.

[32] To peruse earlier decisions with respect to "private interest", see the decisions of Commissioner, the Honourable Stuart Stratton, Q.C., in Elizabeth Weir against the Honourable Margaret-Ann Blaney, December 5, 2000 (no breach found);

Bernard Richard against the Honourable Jeannot Volpé, September 28, 2001 (no breach found) and Bernard Richard against Michael Malley, June 5, 2003 (criticized but no breach found) at www.gnb.ca/legis/conflict/investigations/investigations-e.asp

AIR MILES

[33] The evidence is that the credit card issued to Grama's was used inadvertently by the Honourable Mr. Graham's secretary in booking the government sponsored trip to Las Vegas. The evidence is that the credit card had not been used before for public business. The Executive Secretary, Valerie Upton, confirms that it was she who took the wrong credit card number out of the desk drawer and made the booking; that she had not been instructed to use the credit card number and she takes responsibility for the error. The initial responsibility is hers, the ultimate responsibility is his even though, at that moment in time, he was unaware that the Grama's credit card had been used.

[34] At issue is whether Grama's Bake Shop Ltd. received a benefit by getting a credit of air miles from the credit card company. The allegation is that the Deputy Premier conferred a benefit upon his company by using the company's credit card. Presumably, the company could convert the air miles to some saving in a future transaction. For example, the Trustee, Wanda Forsythe, said that, at one earlier time, the company converted air miles to get a back-up toaster. The company gets one air mile for each dollar spent.

[35] Mr. Arseneault asks that the Honourable Mr. Graham cancel the company credit card.

[36] The air miles credit is identifiable and may be used to reduce the cost of a future government trip. The allegation that the Honourable Mr. Graham has breached the *Act* in this regard is premature. Further, it is within the complete discretion of the Trustee of Grama's Bake Shop Ltd. to relinquish any right to the air miles if the company so desires. There is also the possibility of transferring the air miles to the Province if such is permitted, or to let them go fallow or expire.

[37] Having considered the Province's policy concerning air mile benefits, it is my recommendation that government make an in-depth study of this problem of air miles. There are many free benefits to government by having the members use credit cards for which the members personally pay a premium, for example flight delay costs, theft insurance, lost baggage coverage, life insurance, hotel upgrades, internet hookups, expedited check-in, better paper trail, to name a few.

[38] I turn now to the more perplexing allegations against the Deputy Premier. They are connected and, if accepted, one supports and may even prove the other.

[39] The first is that the Honourable Mr. Graham is shown as a director of his company, Grama's. The inference is that if you are a director, you have certain responsibilities to the company and certain obligations under various statutes; consequently, you must be engaged in management.

[40] The annual corporate return filed by his Trustee with the Province showing "Dale Graham" as a director, is not disputed. What he does assert is that the discussion he had with the previous Commissioner never indicated to him that he could not hold himself out as a director of the family business owned by him and his wife, as he had always done. What he says he understood was that he could not engage in the management of the company, that he was temporarily divesting himself of management rights as approved by the previous Commissioner.

[41] The litany of obligations under various other pieces of federal and provincial legislation are extraneous to the Honourable Mr. Graham's obligations under the *Members' Conflict of Interest Act*. In my opinion they have no influence on how the *Act* relating to Members should be interpreted or applied. This legislation is self-contained. The question is how to resolve the wording of s. 14(1)(e) with s.14(2)(c) and (d). I repeat (e)(c) and (d), the first relating to directorship and the others to the Commissioner's approval of the blind management agreement:

> **14**(1) A member of the Executive Council shall not
>
> *(e)* hold an office or directorship, unless holding the office or directorship is one of the member's duties as a member of the Executive Council
>
> **14**(2) A member of the Executive Council may engage in an activity prohibited by subsection (1) if
>
> *(c)* the Commissioner has given the member his or her written approval and has specified the manner in which the activity may be carried out, and
>
> *(d)* the member carries out the activity in the specified manner.

[42] I have already set out the Honourable Mr. Graham's explanation of the history of his dealings with the previous Commissioner and why he believes that his being a director is not a breach of the *Act*. His belief, in this instance, is important but of lesser import than a resolution of the meaning of s.14(1)(e) which appears to be a specific directive that a member of the Executive Council shall not hold an office

or directorship unless the ministerial duty requires it. The plain wording appears to put the Honourable Mr. Graham in breach of the section.

[43] Viewed in isolation, it would appear that the Honourable Mr. Graham has breached s.14(1)(e). To halt the analysis at this point would do a disservice to the members of the legislative assembly and to the rules of interpretation when subsections of the same *Act* are in conflict. As Commissioner, I must look at the intent of the legislation and make every effort to examine areas of harmony between the conflicted subsections. After all, there is a presumption of coherence.

[44] Sullivan, Ruth *Sullivan and Driedger on The Construction of Statutes,* 4th ed. Butterworths Canada, 2002 in concluding that legislatures do not intend to make or empower the making of contradictory enactments said at page 262:

> ***Governing principle.*** It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work dynamically, each contributing something toward accomplishing the intended goal.

[45] It is my intention to interpret s.14 in such a way that the subsections are read together so as to avoid conflict and to ascertain the true intention of the legislation. As the author of *Sullivan and Driedger* said at p. 263: "The presumption of coherence is virtually irrebuttable…contradiction or inconsistency cannot be tolerated; some method of reconciliation must be found…."

[46] The scheme of s.14 is uncomplicated. Subsection 1 lists the areas in which a member of the Executive Council can not be engaged. Subsection 2 sets out the exceptions and gives the rules of engagement as approved by the Commissioner.

[47] If it was the intention of the legislators to limit the powers of the Commissioner in approving exceptions to the prohibited activities, they would have said so. In support of the approval powers contained in s.14(2), I have perused other sections that list the powers of the Commissioner, particularly the range of sanctions that the Commissioner may recommend. These sections indicate an unfettered array of recommendations consistent with the wide power given in s.14(2). As well the entire *Act,* although it is strong in its indignation against an abuse of power, it is protective of the rights of the members because the finding of a breach may result in the political death of the member. For that consequence alone one must be cautious in weighing the allegations, explanations and other evidence for and against a member who is the subject of an investigation.

[48] In my opinion, the wording of s.14(2) evinces the intention of the legislature by perceiving the possibility of conflict in the provisions of s.14 and it, thus,

indicates its own solution. That solution is to give the Commissioner a cautious priority to override the prohibitions in s.14(1) provided that the conditions set forth by the Commissioner are entered into and observed.

[49] The Honourable Mr. Graham entered into a blind management agreement that was approved by the previous Commissioner under s.14(2) and it remains in place. He denies any involvement with management except as permitted under the agreement. This is confirmed by the Trustee who told me, categorically, that she runs it as if she owns it. She states that the Honourable Mr. Graham does not engage in any part of management. She says she neither seeks nor obtains, directly or indirectly, any advice, direction or instruction in connection with the operations of the company; that the entire authority and responsibility for the control and management of the company rests with her. In my opinion this would include her legal responsibilities to the Province under the *Business Corporations Act* of New Brunswick.

[50] The information filed annually at the Office of the Conflict of Interest Commissioner beginning in June, 2000 discloses the Honourable Mr. Graham's position as a director. There have been no changes to date in that annual disclosure. I can only conclude that the previous Commissioner, in granting permission to create a blind management agreement, was cognizant of that disclosure and did not take exception to it.

[51] Under the circumstances, the designation of director as shown in the annual corporate returns filed, without consultation by the Trustee, is merely titular.

[52] There is no evidence to show that the Honourable Mr. Graham has violated his obligations under the agreement. His explanations and those of the Trustee are undisputed except by an allegation of suspicion which has been contradicted and explained. The lesson to be learned here is that action without reflection may well lead to adverse perception.

[53] In short, there is no tangible evidence supporting the very serious allegation that the Honourable Mr. Graham breached the *Act* by engaging in the management of Grama's Bake Shop Ltd.

DISPOSITION

[54] (1) The allegation concerning the "air miles" owed to the Province and accumulated on the corporate card issued to Grama's Bake Shop Ltd, is premature. (2) The furthering of the private interest of the Deputy Premier and of his company, Grama's Bake Shop Ltd. in having some of his constituency meeting lunches paid for by the Province over a period of 149 weeks is minimal as well as having been done in the honest belief and good faith that he had the tacit, if not actual, permission of the previous Commissioner and is not deserving of sanction. The management of the company, in a one-restaurant-village, is bound by the terms of a Blind Management Agreement approved by the previous

Commissioner. (3) The position of "director" in Grama's Bake Shop Ltd. is not excluded under the Blind Management Agreement; that full disclosure was made to the previous Commissioner in the year 2000 and subsequently thereafter in annual disclosures to the Office of the Conflict of Interest Commissioner concerning his directorship; that s.14(2) of the *Members Conflict of Interest Act* empowers the Commissioner to modify the prohibitions in s.14(1)(b) and (e). (4) There is no evidence proving that Mr. Graham has been engaged in the management of his corporation other than as permitted under the terms of the Blind Management Agreement. (5) The rolled-up claim that the allegations *in toto* are sufficient to found a claim that the Honourable Mr. Graham is engaged in the management of the company otherwise than as permitted, fails for obvious reasons.

[55] I do not recommend the imposition of any sanction.

Dated at the city of Fredericton this 17th day of August, 2006.

The Hon. Patrick A.A. Ryan, Q.C.

Pursuant to s.40 of the *Members' Conflict of Interest Act*, I met with the Honourable Dale Graham on August 17, 2006 to inform the Honourable Member of the particulars of my report and to give him the opportunity to make representations before completing my report. No representations were made.

The *ratio decidendi* of my report has not changed.

The Hon. Patrick A.A. Ryan, Q.C.

Conflict of Interest Commissioner
Spem
New Nouveau
Brunswick
Reduxit
Commissaire aux conflits d'intérêts